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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

PHILLIP C. SANDERS,

Plaintiff and Appellant,

v.

ALFRED OTERO,

Defendant and Respondent.

B164191

(Los Angeles County
Super. Ct. No. BC 240946)

APPEAL from orders of the Superior Court of Los Angeles County.

Ernest George Williams, Judge. Affirmed.

Phillip C. Sanders, in pro. per., for Plaintiff and Appellant.

No appearance for Defendant and Respondent.

Plaintiff Phillip Sanders appeals from the orders dismissing his action and denying rehearing of the dismissal. Plaintiff contends his motion for reconsideration should have been granted as it merited a hearing. We affirm.

FACTUAL AND PROCEDURAL SYNOPSIS

I. Factual Background

The complaint is not part of the record on appeal. This brief summary of its allegations is based on appellant's description in his brief. On November 8, 2000, appellant filed a complaint for dental malpractice against Alfred Otero for dental work Otero performed on appellant when appellant was incarcerated at Los Angeles County Jail, Men's Central. Otero was the chief dental officer for the Los Angeles County jail system. On February 4, 1992, a court ordered Otero to perform dental work on appellant, i.e., a root canal and restorative crown. Otero initiated the work, but did not complete it. Appellant was convicted and transferred to the Department of Corrections. Otero failed to exercise his authority and delay the transfer until completion of the court-ordered work and failed to have another licensed dentist complete the work. The Department of Corrections also refused to complete the work.

II. Procedural History¹

Service of the summons and complaint was allegedly made on December 28, 2000. Otero failed to appear at any scheduled conference or hearing and failed to

¹ Some of the procedural history is also not supported by the record on appeal and is given for background purposes only as it is based on statements in appellant's brief. (See *DeRose v. Carswell* (1987) 196 Cal.App.3d 1011, 1019, fn. 3.)

respond by answer. Appellant appeared at every conference and scheduled hearing via telephone pursuant to California Rules of Court, rule 298.

Appellant filed a motion for default which was twice rejected due to “improper service.”

Appellant sought to serve the statement of damages required by Code of Civil Procedure section² 425.11. When appellant served the statement at the address at which the complaint and summons had been served, the Sheriff’s Department informed appellant that Otero no longer worked at that location and had retired two years before.

Appellant applied to the Dental Board of California (“Board”) for information as to Otero’s current address. The Board informed appellant that Otero’s license had been placed on inactive status on December 6, 2001. The Board also stated Otero was in the process of renewing his license and gave appellant a private practice address in Downey, California. Appellant attempted service of the statement of damages at the Downey address. According to the Sheriff’s Department, a dental assistant named Dorlores confirmed that Otero had moved out of town over a year previously and the dentist at that location was a Dr. Ruben Armienta.

Appellant served a civil subpoena on Dr. Armienta, and Dr. Armienta appeared at a hearing on January 18, 2002. Dr. Armienta stated that he was not a partner or associate of Otero and that Otero owned the property at which Dr. Armienta rented space for his practice. Dr. Armienta was unaware of Otero’s whereabouts and paid his rent to a service.

Appellant again contacted the Board for current information on Otero. The Board gave appellant an address in Santa Fe, New Mexico. Appellant then served the statement of damages at that address. When appellant did not receive a return receipt of delivery, he contacted the postmaster. After appellant received no response from the postmaster, he contacted the mailroom at the prison where he was incarcerated. The mailroom staff

² All statutory references are to the Code of Civil Procedure.

replied they had not received a receipt and would have logged it and returned it to appellant if they had.

On April 18, 2002, the court set an order to show cause (“OSC”) for December 2 to dismiss the action as service had not been properly effected in the two years since the complaint had been filed and no default had been entered against Otero. On December 12, the court dismissed the action for failure to effect service. Appellant filed a motion for hearing and reconsideration of the dismissal on the basis he had been unable to attend the hearing as he had been subject to an institutional lockdown caused by a declared state of emergency. The court denied the motion at a non-appearance case review.

Appellant filed a timely notice of appeal from the order dismissing the action and the order denying his motion for rehearing/reconsideration.³

DISCUSSION

Defendant did not file a respondent’s brief in this case; thus, this court will decide the appeal on the record, the opening brief and any oral argument by plaintiff. (Cal. Rules of Court, rule 17(a)(2).) “Some courts have treated the failure to file a respondent’s brief as a consent to reversal. But that scenario is rare: [¶] The prevailing approach is to examine the record on the basis of appellant’s brief and reverse only if prejudicial error is found.” (Citation omitted.) (Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs, *supra*, § 9:282.)

“A judgment or order of the lower court is presumed correct. All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown. This is not only a general principle of appellate

³ There is a split of authority whether a section 1008 motion for reconsideration is appealable. (See discussion in Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2002) § 2:158-2:160.) Appellant did not cite any authority for reconsideration in his motion. However, there is no timing issue as the notice of appeal was timely as to the order of dismissal.

practice but an ingredient of the constitutional doctrine of reversible error.” (9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 349, p. 394.) “The burden is on the appellant, not alone to show error, but to show injury from the error.” (Emphasis deleted.) (9 Witkin, Cal. Procedure, *supra*, Appeal § 409, p. 461.)

Appellant’s action was dismissed for failure to properly effect service. Appellant has provided no authority nor any argument as to why that ruling was improper. (See *MST Farms v. C. G. 1464* (1988) 204 Cal.App.3d 304, 306.) Otero was served by substitute service at his place of employment, but service was not proper as copies of the summons and complaint were not mailed to Otero via first class mail, postage prepaid, to the place where the copies were left nor was the person apparently in charge, with whom the summons and complaint were left, told what the papers were. (See § 415.20; Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2003) § 4:206, p. 4-31 and form on p. 4-87.)

Accordingly, the case was properly dismissed for the failure to effect service of the summons and complaint.

DISPOSITION

The orders are affirmed. Appellant to pay his own costs on appeal.

WOODS, J.

We concur:

PERLUSS, P.J.

JOHNSON, J.